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In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

GINO GONZAGA RODRIQUEZ

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

The Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e), establishes a mandatory minimum sentence for a felon convicted of possession of a firearm if the defendant has three prior convictions for "serious drug offenses" or "violent felonies." A "serious drug offense" includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." *Id.* § 924(e)(2)(A)(ii). The question presented is:

Whether a court determining if a state conviction qualifies as a "serious drug offense" should look only to the maximum term of imprisonment prescribed by statute for commission of the offense, or must consider, in addition, particular facts of the defendant's case that could lead to an enhanced sentence under a broadly applicable state recidivist statute.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (J.A. 255-71) is reported at 464 F.3d 1072. The sentencing order of the district court (J.A. 245-54) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 2006. A petition for rehearing was denied on January 12, 2007 (J.A. 272-73). On March 29, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 12, 2007. On May 2, 2007, Justice Kennedy further extended the time to and including June 11, 2007. The petition was filed on that date and granted on September 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e) (2000 & Supp. IV 2004), is reprinted in an appendix to the brief of the United States at App. 1a-2a.

STATEMENT

1. Under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), a felon found guilty of possession of a firearm is subject to a mandatory minimum sentence of fifteen years if he or she has three previous convictions for a "violent felony" or a "serious drug offense." Section 924(e)(2)(A)(ii) defines a "serious drug offense," in part, as "an offense under state law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law."

When the ACCA was originally enacted in 1984, robbery and burglary were the only predicate offenses under the statute. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185. In 1986, Congress expanded the predicate offenses triggering the ACCA by replacing burglary and robbery with three broad categories of crime: violent felonies involving the use, attempted use, or threatened use of physical force; crimes involving a serious risk of physical injury to another; and serious drug crimes. Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Subtitle I, § 1402, 100 Stat. 3207. As the 1986 amendment was drafted, "a consensus developed" supporting the addition of the violent felonies category and violations of "State and Federal laws for which a maximum term of imprisonment of 10 years or more is prescribed for manufacturing, distributing or possessing with intent to manufacture or distribute controlled substances." H.R. Rep. No. 99-849, at 3 (1986). Debate over which property crimes to include produced the language in section 924(e)(2)(B)(ii), which encompasses certain enumerated crimes as well as "conduct that presents a serious potential risk of physical injury to another." That language reflects Congress's intention to cover "fairly serious crimes" that present a "potential threat of harm to persons." *Taylor* v. *United States*, 495 U.S. 575, 587 (1990).

2. In April 2003, law enforcement officials in Spokane County, Washington, arrested respondent Gino Gonzaga Rodriquez outside the apartment in which he was living for failure to satisfy the requirements of his community supervision. J.A. 256. After obtaining the consent of a co-occupant, authorities searched the apartment and found a gun. J.A. 258. Respondent had agreed to dispose of the gun,

which had belonged to a friend of the co-occupant's teenaged son. J.A. 256-57.

A jury subsequently convicted respondent of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). At sentencing, the government sought to apply the ACCA sentencing enhancement, 18 U.S.C. § 924(e), thereby subjecting respondent to a mandatory minimum sentence of fifteen years in prison. J.A. 245-46. The government invoked this sentencing enhancement, in part, on the basis of respondent's prior convictions under Washington law for delivery of a controlled substance. J.A. 250.[1]

The convictions at issue occurred simultaneously on November 16, 1995, when respondent pleaded guilty to three offenses involving the delivery of Schedule III, IV and V controlled substances. *Ibid.* Under Wash. Rev. Code § 69.50.401(a)(1) (1994) (J.A. 283-84), "any person [who] manufacture[s], deliver[s], or possess[es] with intent to manufacture or deliver" such substances is subject to a maximum sentence of five years' imprisonment. In 1995, the relevant state sentencing guidelines – which were mandatory and set an upper limit on respondent's sentence – provided that respondent's permissible sentencing range for each of these offenses was 43-57 months. See Wash. Rev. Code § 9.94A.310 (1994). See also J.A. 16, 42, 93.[2] Respondent was sentenced

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[1] Respondent does not contest that two California burglary convictions in 1980 and 1982 qualify as ACCA predicate offenses.

[2] The Washington guidelines contain a grid with offense "seriousness level" on one axis and "offender score" on the other. See Wash. Rev. Code § 9.94A.310 (1994). Based on respondent's offense of conviction, an offense "seriousness level" of four applied. His criminal history resulted in an "offender score" of seven. J.A. 16. The resulting sentencing range accord-

to forty-eight months' imprisonment on each conviction, with the sentences to run concurrently. J.A. at 21, 47, 98.

Washington law also contained a separate provision, Wash. Rev. Code § 69.50.408(a) (1994), that permitted state courts to impose enhanced sentences for individuals convicted of "a second or subsequent" controlled substance offense. J.A. 286. Courts in Washington are divided on whether a sentencing judge has discretion to decline to apply the enhancement. Compare *State* v. *O'Neal*, 109 P.3d 429, 446 (Wash. App. Div. 2, 2005) (enhancement is discretionary); *State* v. *Mayer*, 86 P.3d 217, 221 (Wash. App. Div. 3, 2004) (same), with *In re Hopkins*, 948 P.2d 394, 397 (Wash. App. Div. 1, 1997), rev'd, 976 P.2d 616 (1999) (appellate court held that enhancement was required, but state supreme court reversed prior to reaching the question).[3] If a judge does apply the enhancement, a defendant with a qualifying predicate conviction is subject to a maximum prison term of twice that otherwise authorized. J.A. 286.

Documents titled "Statement of Defendant on Plea of Guilty to a Felony," which were signed by respondent, stated that the standard sentencing range

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ing to the grid was 43-57 months' imprisonment. See Wash. Rev. Code § 9.94A.310 (1994). This "standard sentence range" was mandatory and respondent could not receive a higher sentence absent the finding of aggravating circumstances. *Id.* § 9.94A.120(1)-(2) (providing that unless exceptional circumstances were found, "the court shall impose a sentence within the sentence range for the offense."). See also *Blakely* v. *Washington*, 542 U.S. 296, 299-300 (2004) (describing Washington sentencing regime).

[3] The conviction at issue here occurred in Spokane County, (J.A. 13), which is in Division Three. Accordingly, courts have discretion in this district to apply the recidivist enhancement. See Wash. R. App. P. 4.1(b)(3).

was 43-57 months' imprisonment. J.A. 28, 54, 105. Two of the statements make reference only to the standard sentencing range (J.A. 54, 105) while one statement also notes that respondent's maximum sentence was ten years (J.A. 28). The judgment and sentence corresponding to these statements likewise listed the presumptive sentencing range as 43-57 months and the maximum possible sentence as ten years. J.A. 16, 42, 93. No prior conviction for a controlled substance offense is noted.

3. Based on this record, the government argued before the district court that respondent's 1995 convictions qualified as "serious drug offenses" under 18 U.S.C. § 924(e). The government contended that the Washington recidivist sentencing enhancement, Wash. Rev. Code § 69.50.408, "automatically applied" to respondent's convictions, doubling the five-year maximum term of imprisonment prescribed by the offense and producing a maximum possible term of imprisonment of ten years. J.A. 197.

The district court rejected the government's position, holding that "the application of the separate sentencing statute does not alter the maximum sentence available for the crime itself." J.A. 252. Relying on this Court's decision in *Taylor*, the district court ruled that "[i]n determining whether a particular offense qualifies as a predicate offense for the [ACCA] enhancement, the court engages in a categorical analysis, in that the court does not examine the facts underlying the prior offense, but 'looks only to the statutory definitions of the prior offenses.'" J.A. 246 (quoting *Taylor*, 495 U.S. at 600). Observing that "[t]he Government's labeling of the [recidivist] statute as non-discretionary and not a sentencing enhancement does not affect the analysis" (J.A. 254), the court recognized that the statute invoked

by the government was meant to address recidivism and "[a]s the Supreme Court clearly stated, 'recidivism does not relate to the commission of the offense'" (J.A. 253 (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 488 (2000))).

The court therefore found that "on its face," Washington's "statutory definition of [respondent's] prior drug offenses do[es] not meet the criteria for a predicate offense for purposes of the armed career criminal enhancement" because it prescribes a maximum prison term of only five years. J.A. 253. As the court found only two qualifying predicate offenses, it ruled that the ACCA did not apply in this case. J.A. 254.

4. The court of appeals unanimously affirmed. J.A. 255-71. Invoking "the 'familiar analytical model constructed by the Supreme Court in *Taylor*,'" the court held that, "[f]or federal sentencing enhancement purposes, when we consider the prison term imposed for a prior offense, 'we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements.'" J.A. 265 (quoting *United States* v. *Corona-Sanchez*, 291 F.3d 1201, 1203, 1209 (9th Cir. 2002)). The court observed that "the essence of [the government's argument] is that we consider the offense and the sentencing enhancement together" (J.A. 270), and rejected that contention based on "the Supreme Court's historic separation of substantive crimes and recidivism, pertinent legislative history, and our own cases distinguishing between substantive offenses and recidivist sentencing enhancement statutes" (J.A. 267).

The court of appeals denied the government's petition for rehearing en banc, with no judge requesting a vote. J.A. 272-73.

SUMMARY OF ARGUMENT

The parties approach the ACCA from fundamentally different perspectives. Respondent views the statute as focusing on the seriousness of the "offense" committed by the defendant, with seriousness measured by the maximum penalty the state legislature attached to the commission of that crime. The government, in contrast, views application of the ACCA as turning on the particular characteristics of the *offender* rather than of the *offense*, so that the same crime will be regarded as "serious" for ACCA purposes when committed by some defendants and as non-serious when committed by others.

Respondent has the better of this argument. The plain language and clear policy of the ACCA – which asks whether the defendant's "offense" is one "for which a maximum term of imprisonment of ten years or more is prescribed by law" – means that a court should look to the penalty assigned by the legislature to a conviction for engaging in conduct constituting the elements of the offense. Under this statutory formula, the defendant's status as a recidivist has no connection at all to whether the offense committed by the defendant was a "serious" one. That conclusion is supported by the congressional intent, recognized repeatedly in this Court's decisions applying the ACCA, which requires a "categorical" treatment of offenses under the statute. And it is confirmed by the recognition that Congress is perfectly capable of referring to "categories of offenders" when that is what it means – as it has done in *other* statutes but did not do in the ACCA.

The government's reading suffers from more than inconsistency with the ACCA's language and policy. The government insists that the possibility of a recidivist enhancement is relevant because the ACCA is triggered when the defendant "actually faced" a ten-year sentence. But this approach is unworkable, requiring federal courts to determine what sentence the defendant "actually faced" by engaging in difficult inquiries regarding novel questions of state law and complex factual determinations regarding long-forgotten proceedings in state court. It also suffers from a fatal flaw of logic. The government asks whether the defendant "actually faced" a ten-year sentence. U.S. Br. 14. But under mandatory state sentencing guidelines, which are just as much a component of state law as the recidivist provision invoked by the government, respondent "actually faced" a sentence well *below* the ten-year ACCA trigger. If the government's approach is correct, respondent accordingly may not be subject to an enhanced ACCA sentence. In this light, the government's insistence that recidivist enhancements count under the ACCA – but that binding caps from state sentencing guidelines do not – demonstrates the fundamental incoherence of its approach.

ARGUMENT

I. CONGRESS DID NOT INTEND THAT RECIDIVISM ENHANCEMENTS BE TAKEN INTO ACCOUNT IN DETERMINING THE "MAXIMUM TERM OF IMPRISONMENT * * * PRESCRIBED BY LAW" FOR A "SERIOUS DRUG OFFENSE" UNDER THE ACCA.

The government's approach is entirely divorced from the language and manifest purpose of the

ACCA. There is no doubt about the goal of the statute: it was designed to impose mandatory penalties on persons who engaged repeatedly in "a large number of *fairly serious crimes* as their means of livelihood." *Taylor*, 495 U.S. at 587 (emphasis added). In providing for these penalties, Congress expressly had in mind persons who committed offenses that were particularly dangerous or destructive of societal values – in the statute's terms, those that are a "violent felony" or a "serious" drug offense. Congress thus sought "to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof." *Id.* at 590.

To qualify as a trigger for the ACCA's enhanced penalty, the defendant's prior convictions accordingly must be for engaging in *conduct* of the sort that Congress regarded as "violent" or "serious." In the context of state drug offenses, Congress used the maximum penalty specified for the offense by state law as a short-hand means of identifying conduct deemed sufficiently "serious" to trigger the ACCA's mandatory penalty. Thus, "serious drug offense" is defined, in relevant part, as "an offense * * * for which a maximum term of imprisonment of ten years or more is prescribed by law" (18 U.S.C. § 924(e)(2)(A)(ii)); the congressional premise was that an offense punishable by such a lengthy term of imprisonment involved conduct sufficiently serious to warrant treating it as a trigger for the ACCA's mandatory minimum.[4] Under this regime, the focus is on the acts

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[4] The ten year or greater sentence definition for "serious drug offenses" was suggested by the Department of Justice to ensure that the ACCA targeted prior convictions for "drug importation or exportation." *The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 99th Cong. 10 (1986) (statement

constituting the offense of conviction and the penalty prescribed for commission of that offense. A sentencing enhancement for recidivism, which says nothing about whether that offense was "serious" or the defendant's conduct especially dangerous, plays no part in this equation.

1. When determining whether a maximum term of ten years is "prescribed by law" for an "offense," courts should look to the penalty associated by the legislature with conviction *for committing the acts constituting the particular offense* charged to the defendant. That approach is dictated by the ACCA's plain language, which associates the triggering ten-year prison term with an "offense" – a word that generally is understood to describe the elements constituting the crime. See *Black's Law Dictionary* 1110 (8th ed. 2004) (defining "offense" as "a violation of the law; a crime"). As a consequence, if the statute defining the offense for which the ACCA defendant previously was convicted provides for a maximum prison term of less than ten years, the legislature did not regard the conduct as "serious" enough to trigger

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of James I. K. Knapp, Deputy Assistant Attorney General) [hereinafter *ACCA Amendment Hearing*]. In 1986, when Congress enacted the "serious drug offense" prong of ACCA, many states treated offenses involving distribution of, manufacture of, and possession with intent to manufacture or distribute "narcotic" drugs – opium, heroin, cocaine, and the like – as "serious" enough to warrant a maximum prison sentence of ten years or more. See, *e.g.*, Cal. Health & Safety Code §§ 11351.5, 11370.4; Fla. Stat. §§ 775.082(3)(c), 893.13(1)(a)(1); Mich. Comp. Laws § 333.7401(2)(a); N.Y. Penal Law §§ 70.00, 220.16; Tex. Rev. Civ. Stat. art. 4476-15, §§ 4.01(b)(1), .03. These very same states, however, treated identical conduct regarding less "serious" substances as less serious, punishable by a prison term of less than ten years. See, *e.g.*, Cal. Health & Safety Code §§ 11378.5; Fla. Stat. §§ 775.082(4), 893.13(1)(a)(3); Mich. Comp. Laws § 333.7401(2)(d); N.Y. Penal Law §§ 70.00, 220.31; Tex. Rev. Civ. Stat. art. 4476-15, §§ 4.01(a)(1), .044.

the ACCA's mandatory penalty. As then-Chief Judge Breyer put it for the First Circuit in similar circumstances, to make this determination the court "simply look[s] to the crime as the statute defined it." *United States* v. *Doe*, 960 F.2d 221, 224 (1st Cir. 1992).

There is no place for factoring a recidivist enhancement into this scheme. As the United States concedes (U.S. Br. 15), recidivism typically is not an element of the offense and was not in fact an element of the Washington offense for which respondent was convicted. See generally *Almendarez-Torres* v. *United States*, 523 U.S. 224, 244 (1998) (observing the "longstanding tradition" that "recidivism 'does not relate to the commission of the offense, *but goes to the punishment only*'" (emphasis in original) (quoting *Graham* v. *West Virginia*, 224 U.S. 616, 624 (1912))). And the defendant's status as a recidivist has no connection to whether the offense committed by the defendant was a "serious" one.

Arguing to the contrary, the government suggests that an offense "might have been deemed more serious" (by a state legislature or by Congress) if committed by a repeat offender. U.S. Br. 17. But that is a very odd use of language. One might say that such an offender is deserving of harsher punishment; that is, of course, the basis for enhancing the sentences of recidivists. But in ordinary usage, that hardly means that the "offense" committed by that defendant is a more "serious" one. The nature of the conduct, the elements of the offense, and the impact of the crime are the same regardless of the criminal history of the defendant – and those are the characteristics that typically are used to gauge the "seriousness" of an offense.

2. This understanding of the ACCA is strongly supported by the Court's decisions mandating a "categorical" approach to the statute. See, *e.g.*, *Taylor*, 495 U.S. at 588; *James* v. *United States*, 127 S. Ct. 1586, 1594 (2007). The categorical approach rests on the congressional intent – reflected in the statutory language – to focus the ACCA inquiry on the offense of conviction, rather than on collateral matters unrelated to the definition of the crime. As the Court put it in *Taylor*, the statutory language "generally supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories." 495 U.S. at 600. "Congress intended that the enhancement provision be triggered by crimes having certain *specified elements* * * *. [T]he proposed versions of the 1986 amendment carried forward this categorical approach, extending the range of predicate offenses to *all crimes having certain common characteristics* * * * regardless of how they were labeled by state law." *Id.* at 588-89 (emphasis added). See also *id.* at 590 ("Nor is there any indication that Congress ever abandoned its general approach, in designating predicate offenses, of using uniform, categorical definitions to *capture all offenses of a certain level of seriousness* * * * regardless of technical definitions and labels under state law.") (emphasis added).

The Court confirmed this understanding earlier this year. In *James*, the Court elaborated on the "categorical approach," explaining that it "'look[s] only to the fact of conviction and the statutory definition of the prior offense,' and do[es] not generally consider the 'particular facts disclosed by the record of conviction.'" 127 S. Ct. at 1593-94 (citations omitted). To determine what counts as a predicate of-

fense, the Court added, courts should "consider whether the *elements of the offense* are of the type that would justify its inclusion * * * without inquiring into the specific conduct of this particular offender." *Ibid.* (emphasis in original). The Court's most recent precedent thus confirms Congress's intent that judicial inquiry into the meaning of the term "offense" should focus on the elements of the underlying state statutory violation. When the ACCA was enacted, "no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." *Taylor*, 495 U.S. at 601. But that is just what the government contends here: that "a particular crime might sometimes count towards enhancement and sometimes not, depending" on who commits it. *Ibid.*

The legislative background also confirms the congressional focus on the nature of the criminal act giving rise to the ACCA defendant's conviction. Congress clearly envisioned a certain character of violent crime when it originally considered the statute. See S. Rep. No. 97-585, at 5-6, 62-63 (1982) (noting Congress designed the ACCA from the outset to punish the crimes of armed burglary and armed robbery because "these two offenses * * * are the most prevalent, frightening, and harmful of all the violent crimes that could be federally prosecuted").[5] And this notion of severity persisted through the Act's amendment. See H.R. Rep. No. 99-849, at 3 (stating

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[5] S. Rep. No. 97-585 addresses an earlier version of the ACCA that did not pass the Senate, S. 1688, 97th Cong. (1982). Congress later passed the measure as S. 52, 98th Cong. (1984), and expressly recognized the two measures as substantively the same. See S. Rep. No. 98-190, at 3 (1983).

that the purpose of the Act was to cover violent felonies, an element of which is the use or attempted or threatened use of physical force against a person and enumerating murder, rape, assault, and robbery as examples).

3. The government, of course, takes a different view. Its case is premised on the proposition that the existence of a state recidivism provision means that the legislature has established "*alternative* maximum terms of imprisonment" for the same offense that apply to different categories of "offenders." U.S. Br. 16 (emphasis in original). The government repeats this formulation of the issue throughout its brief (see, *e.g.*, *id.* at 19-20), including in its statement of the question presented. See *id.* at i (asking "[w]hether a state drug-trafficking offense, for which the maximum term of imprisonment *for repeat offenders* was ten years, qualifies as [an ACCA] predicate offense" (emphasis added)).

That approach might have some force had Congress written a different statute – had it drafted the ACCA to say, for example, that the mandatory fifteen-year sentence is triggered when the defendant is "*an offender* subject to a maximum term of imprisonment of ten years for commission of a drug offense." But the government's approach cannot be squared with the statute that Congress *actually* wrote, which refers to the penalty "prescribed by law" for an "offense" and *not* to the sentence that may be imposed on categories of "offenders." The distinction is fundamental; the first approach (the one Congress actually used) focuses on the crime for which the defendant was convicted, while the second (the one the government prefers) looks to characteristics of defendants that may qualify them for enhanced penalties.

There is, moreover, every reason to believe that Congress's decision to use "offense" rather than "offenders" was made advisedly and intentionally. The point is made clear by *United States* v. *LaBonte*, 520 U.S. 751 (1997), a decision that is featured prominently in the government's brief. See U.S. Br. 17-19. The statute at issue in that case, 28 U.S.C. § 994(h), in fact used the government's preferred formulation, providing that the Sentencing Commission "shall assure that the [sentencing] guidelines specify a sentence to a term of imprisonment at or near the maximum term *authorized for categories of defendants*" who have certain types of prior convictions. In holding that the "maximum term" identified in Section 994(h) for a repeat offender is the one that could be imposed on a "career offender" rather than the one that could be imposed on a first-time offender, the Court specifically relied on the "categories of defendants" language used by Congress, finding it crucial that the statutory scheme "obviously contemplates two distinct categories of repeat offenders for each possible crime." *LaBonte*, 520 U.S. at 759. See also *id.* at 758 ("Congress has expressly provided enhanced maximum penalties for certain categories of repeat offenders * * *.").[6] The ACCA, in

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[6] In addition, the tiered system of the Federal Sentencing Guidelines at issue in *LaBonte* was *designed* to provide base-level punishments for offenders that could be increased if certain enhancement sentencing factors were satisfied. In contrast, nothing in the ACCA suggests that Congress intended that identical predicate offenses be treated differently depending upon the criminal history of the defendant. In fact, the government recognizes this very distinction when it discusses *United States* v. *R.L.C.*, 503 U.S. 291 (1992). The government argues that the Federal Sentencing Guidelines at issue in that case "significantly differed" from the ACCA "because [they] expressly contemplated an offender-specific maximum

notable contrast, makes no reference to "categories of offenders" or "categories of defendants."[7]

This distinction is especially notable because Congress enacted Section 994(h) in 1984, the same year that it initially passed the ACCA and two years before it enacted the ACCA "serious drug offense" language at issue here. The Court should find it significant that Congress, when it enacted a statute that addressed a sentencing issue shortly after passage of Section 994(h), chose to depart from that provision's pre-existing "categories of defendants" formulation and instead focused on penalties for the "offense." "[W]hen Congress uses different words * * * a court [should not] ordinarily equate the two phrases." *Doe* v. *Chao*, 540 U.S. 614, 630 (2004). See also *Lawrence* v. *Florida*, 127 S. Ct. 1079, 1083-84 (2007); *Lopez* v. *Gonzales*, 127 S. Ct. 625 (2006). Although the government's attempt to make lemonade from the *LaBonte* lemon therefore is commendable,

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sentence" as opposed to one "for the underlying offense." U.S. Br. 34.

[7] The government also strains to find significance in the ACCA's use of the article "a" in referring to "*a* maximum term of imprisonment of ten years" when it defines "serious drug offense." U.S Br. 16-17. This choice of language means, the government suggests, that Congress had in mind multiple "maximum terms of imprisonment" that would vary according to the identity of the defendant; otherwise, the argument continues, Congress would have used the formulation "*the* maximum term of imprisonment." *Ibid.* But this is a very improbable deconstruction of the statutory language. A formulation referring to "an offense under state law * * * for which *the* maximum term of imprisonment of ten years or longer is prescribed by state law" would have been both awkward and arguably ungrammatical. There is no reason at all to believe that, in using the much more natural formulation "a maximum term of imprisonment * * * is prescribed by state law," Congress had in mind the government's "alternative sentences" theory of this case.

its argument draws precisely the wrong conclusion from that decision.[8]

4. Given the government's departure from the statutory language, it comes as no surprise that the government's approach also would distort the legislative purpose, vastly expanding the reach of the ACCA in a manner that Congress could not have anticipated or approved. As we have noted, the ACCA was aimed at defendants who engaged in "a large number of fairly serious crimes * * *." *Taylor*, 495 U.S. at 587. But use of a recidivist enhancement to trigger the ACCA would mean that predicate offenses no longer need be "serious." That is true in this case, where respondent was convicted of distribution of a Schedule III-V controlled substance. And it can be seen more graphically by reference to other state recidivist laws, which – under the government's theory – would make the ACCA predicates out of offenses that almost universally are regarded as *less* than serious.[9] The effect would be to convert the

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[8] This conclusion should come as no surprise to the government; it previously has argued that the phrase "maximum term of imprisonment that would be authorized" as used in another statute should be read to mean "maximum term of imprisonment authorized *in the law defining the offense*." U.S. Br., 1991 WL 521298, at *14-*15, *United States* v. *R.L.C.*, 503 U.S. 291 (1992) (No. 90-1577) (emphasis added). See also *R.L.C.*, 503 U.S. at 297 ("The Government suggests [that the statute] * * * must mean the maximum term of imprisonment provided for by the *statute defining the offense* * * *.") (emphasis added); U.S. Br. (No. 90-1577), 1991 WL 521298, at *25-*26 (arguing that there is no "reasonable doubt" that the "maximum term of imprisonment" language in the Juvenile Delinquency Act "refers to the maximum statutory penalty"). Invoking the rule of lenity, the Court rejected the government's argument in *R.L.C.* We address that decision in more detail, *infra*, at 44.

[9] Applying the Government's proposed rule could elevate misdemeanor petty offenses or minor drug crimes into "violent

ACCA into a kind of "three strikes" law that is unconcerned with the severity of the offenses that trigger its application.

The government's approach also would have other consequences that could not have been intended by Congress. Thus, the ACCA defines a "violent felony" as:

> Any crime punishable by imprisonment for a term exceeding one year * * * that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another * * *.

18 U.S.C. § 924(e)(2)(B). Under this provision, the "crime" itself must be "punishable by imprisonment for a term exceeding one year." *Ibid.* And because a "crime" is "[a]n act that the law makes punishable" (*Black's Law Dictionary* 399 (8th ed. 2004)), in determining the relevant punishment courts must look

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felonies" or "serious drug offenses" within the ambit of the ACCA. In Michigan, for example, a predicate crime of selling generic Tylenol with codeine would be enhanced under that state's habitual offender statute, Mich. Comp. Laws § 769.12, to fall within the "serious drug offense" ambit of the ACCA. *Cf. People* v. *Maleski*, 560 N.W.2d 71, 75 (Mich. App. 1996). See also *Lockyer* v. *Andrade*, 538 U.S. 63, 66-67 (2003) (discussing enhancement of petty theft conviction to 25-year minimum sentence under Cal. Penal Code § 667(e)(2)(A) (West 1999)); *State ex rel. Chadwell* v. *Duncil*, 474 S.E.2d 573 (W. Va. 1996) (upholding two enhancements of misdemeanor shoplifting, applying a maximum term of imprisonment of ten years and a five year recidivist enhancement).

at the sentence prescribed for the act that constitutes the offense itself.

Yet, as the government recognizes (U.S. Br. 36-37), the rule regarding consideration of recidivism should be the same under the ACCA's "serious drug offense" and "violent felony" provisions. This means that adopting the government's rule in this case would lead to the anomalous result that a *misdemeanor* offense could qualify as a "violent felony." That is so because many states impose increased penalties on repeat offenders convicted of misdemeanor offenses, and these penalties can exceed one year. See, *e.g.*, Tex. Penal Code Ann. § 49.09(b)(2) (Vernon 2007) (driving while intoxicated enhanced from a Class B misdemeanor, with a 180-day maximum term of imprisonment (*id.* at § 12.22), to a third degree felony, with a maximum term of ten years (*id.* at § 12.34), where defendant has two prior DWI convictions). In these instances, although the elements of the offense remain the same, the penalty changes based on the particular facts of the defendant's criminal history.

Congress, however, did not intend for conduct that constitutes only a misdemeanor offense to trigger the ACCA's severe penalties. The "violent felony" category of predicates was intended to cover only serious crimes. See S. Rep. No. 97-585, at 9 (1982) ("The bill expressly includes violations of State law, provided that those violations are *felonies.* * * * [T]he sentences imposed are *immaterial.*" (emphasis added)); *id.* at 70 ("With regard to the prior convictions, the Bill [S. 1688] requires that they be for * * * felonies."); *id.* at 5-6, 62-63 (noting that Congress wrote the ACCA to punish crimes of armed burglary and armed robbery because "these two of-

fenses * * * are the most prevalent, frightening, and harmful of all the violent crimes that could be federally prosecuted."). See also *ACCA Amendment Hearing*, *supra*, at 9-10 n.4 (advocating limiting predicate offenses to those "serious enough in nature that a felony sentence could have been imposed"). To avoid this anomalous result, the Court should exclude consideration of an offender's criminal history when determining whether a crime is a "violent felony" or a "serious drug offense."

5. The government's response to these concerns is the assertion that, because the ACCA is itself a recidivist provision, "it would be incongruous for Congress to ignore the possibility that prior offenses might have been deemed more serious (as measured by the applicable penalty) precisely because the defendant was at that time a repeat offender." U.S. Br. 17. But as we have argued, that approach is flatly inconsistent with the statutory focus on "serious drug offenses" and "violent felonies." It also leads to a sort of perverse bootstrapping, in which a defendant is punished under federal law *for being treated as a recidivist under state law*. That understanding of the statute cannot be squared with the congressional view that "the punishment of imprisonment for at least fifteen years is based entirely on the present offense, *not on the defendant's 'status' as a 'career criminal.'*" S. Rep. No. 98-190, at 8 (1983) (emphasis added). The ACCA provides enhanced punishment for persons convicted of engaging in a set of defined bad acts; the government would read that central purpose out of the statute.

The government also contends that the court of appeals' reading of the ACCA results in the "anomaly" of "treat[ing] repeat offenders as having faced a 'maximum' term that was *lower* than the term for

which they were eligible." U.S. Br. 20-22 (emphasis in original). In fact, as we explain in more detail below (at 38-47, *infra*), it is the government's reading of the statute that creates the real anomaly; its approach treats a defendant as having "actually faced" or having been "eligible for" a sentence *that could not lawfully have been imposed*. In contrast, there is no anomaly at all in the court of appeals' approach. The ACCA provides a formula, based on the maximum possible sentence for the "offense," for determining whether a given offense qualifies as a predicate. Under this formula, the relevant "maximum" prison term, and the one that establishes "seriousness," is that associated with the offense of conviction. The sentence imposed on any given defendant is immaterial in making this "categorical" determination.

II. THE GOVERNMENT'S PROPOSED INTERPRETATION OF THE ACCA WOULD BE UNMANAGEABLE, RAISE CONSTITUTIONAL CONCERNS, AND UPSET THE BALANCE BETWEEN FEDERAL AND STATE COURTS.

Departure from the language and policy of the ACCA is not the only defect in the government's approach. The government's construct also is unworkable, requiring federal courts to engage in difficult inquiries regarding novel questions of state law and complex factual determinations about long-past proceedings in state courts. Because the ACCA was intended to avoid just the sort of "practical difficulties and potential unfairness" (*Taylor*, 495 U.S. at 601) that follow from the government's approach, these concerns militate powerfully against the government's position.

Under the government's rule, a drug offense would count as an ACCA predicate whenever a state defendant was exposed to "the possibility of a valid ten-year sentence" under a state recidivist law. U.S. Br. 19. That would hinge, in the government's view, on whether defendant "actually faced," was "subject to," or "*could* have received" an enhanced recidivist sentence of ten years or more. *Id.* at 14, 20, 19, 22, 25 (emphasis in original). As we understand it – and as the United States has expressly argued in other courts[10] – its test is satisfied so long as the recidivist enhancement could have been sought or imposed, even if it in fact was neither sought by the prosecutor nor imposed by the judge. This test, the government maintains, would be easy and painless to apply; its only discussion of the practicalities of its rule is a

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[10] The government has consistently advanced an argument in the lower courts that the "maximum term of imprisonment * * * prescribed by law" (18 U.S.C. § 924(e)(2)(a)(i)) includes a recidivist enhancement wherever it *could* have applied, even if the enhancement was not actually sought or expressly applied in the state court proceedings. See, *e.g.*, U.S. Br. 11-12, *United States* v. *Henton*, 374 F.3d 467 (7th Cir. 2004) (No. 03-3657) (arguing that "[d]efendant did not have to actually receive an extended sentence in order to be subject to [the recidivist law's] potential penalties" even though state law "does not mandate that an enhanced penalty be imposed" because the recidivism enhancement is "discretionary"); U.S. Br., 2002 WL 32727050, at *7, *United States* v. *Williams*, 326 F.3d 535 (4th Cir. 2003) (No. 01-4551) ("Although the state prosecutor could have filed an application for an extended term of imprisonment at any time before Appellant's sentencing, he did not file one in either case. * * * [H]owever, that is irrelevant. * * * [T]he Appellant had a prior conviction which exposed him to a potential ten year maximum sentence. * * * [I]t is immaterial whether some act by a prosecutor or judge is necessary to trigger the *imposition* of the ten year maximum sentence. What matters is that the statutory scheme in New Jersey envisions repeat drug offenders to be *subject to* enhanced penalties and to be treated as serious drug offenders." (emphasis in original)).

blithe reference to "the ease of making findings concerning recidivist status." U.S. Br. 20.

The government's confidence on this point, however, is misplaced. Determining whether a defendant "could have received" a recidivist enhancement often will be complex, difficult, and time-consuming. It may require a federal court to decide how a state judge would have treated a prior conviction for a different sort of offense committed in an out-of-state jurisdiction. It may obligate a federal court to resolve novel state-law questions about what sorts of crimes constituted "prior" offenses that triggered recidivist treatment. In some circumstances, it will lead to peculiar and inequitable disparities in sentencing. And it will override state choices regarding procedural safeguards for defendants and the exercise of prosecutorial discretion. Such determinations should not be part of the ACCA sentencing process.

A. The Government's Rule Would Require Federal Courts To Decide Complex Questions Of State Law And To Engage In Difficult And Contested Factfinding That Could Raise Serious Constitutional Concerns.

The Court has repeatedly refused to require federal courts applying the ACCA to wade into a quagmire of "evidentiary disputes" and "collateral trials." *Shepard* v. *United States*, 544 U.S. 13, 23 (2005). To avoid "the practical difficulties and potential unfairness of a factual approach" (*Taylor*, 495 U.S. at 601), the Court generally allows federal courts to consider only "the fact of conviction and the statutory definition of the prior offense." *Id.* at 602. The Court carved out a narrow exception to this rule subject to strict limitations. Where a conviction has resulted

from trial, federal courts may look to charging documents and jury instructions and consider only facts that the jury was "actually required to find." *Ibid.* In the guilty plea context, courts are restricted to facts that the defendant "necessarily admitted" through his plea and may consider only the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard*, 544 U.S. at 16. In addition to ensuring the manageable application of the ACCA, these restrictions limit judicial factfinding to avoid "serious risks of unconstitutionality." *Id.* at 25.

The government's recidivism rule, however, would require a much more complex and confusing inquiry. Under the government's approach, the federal ACCA court would have to resolve threshold matters of state law. Having done that, the court would confront questions growing out of disputed issues of fact concerning the defendant's prior convictions. These factual questions may be difficult in the best of circumstances. And they may be especially complex because, in applying state recidivist law, state courts are not bound by the ACCA standards announced in *Taylor* and *Shepard* – decisions that, although informed by constitutional considerations, ultimately were interpretations of federal statutory law. Some state courts accordingly look beyond the limited range of documents that may be considered in the ACCA inquiry under *Taylor* and *Shepard* when making state recidivist determinations. When prior convictions were returned in those states, a federal ACCA court therefore would have to look beyond the limited range of *Taylor*/*Shepard* documents to determine whether the defendant "actually faced" a recidivist enhancement. That outcome would raise

significant constitutional concerns and entail precisely the sort of "evidentiary disputes" and "collateral trials" that the *Shepard* Court meant to foreclose.

1. To begin with, determining whether a defendant "actually faced" a recidivist enhancement often will turn on resolution of unsettled issues of state law. To offer just one example, state courts may have to determine whether convictions are sufficiently "prior" to constitute predicate offenses. This inquiry may turn on resolution of complicated questions of state law, as well as consideration of underlying facts. In *Commonwealth* v. *Shiffler*, 879 A.2d 185 (Pa. 2005), for example, the Pennsylvania Supreme Court considered a case in which the lower court had applied the Pennsylvania recidivist law even though the "appellant had pleaded guilty to the three prior burglaries *on the same day* * * *." *Id.* at 188 (emphasis added). After consideration of "the recidivist philosophy of sentencing" (*id.* at 188), the supreme court reversed, concluding that the enhancement should apply "only where [an offender's] convictions * * * and corresponding terms of incarceration, are sequential and each is separated by an intervening opportunity to reform" (*id.* at 186). Other courts have reached similar conclusions in respect to similar provisions in their state recidivist laws. See, *e.g.*, *People* v. *Nees*, 615 P.2d 690, 693 (Colo. 1980); *Graham* v. *State*, 435 N.E.2d 560, 561 (Ind. 1982); *Bray* v. *Commonwealth*, 703 S.W.2d 478, 479-80 (Ky. 1986); *Koonsman* v. *State*, 860 P.2d 754, 755-56 (N.M. 1993); *State* v. *Allison*, 923 P.2d 1224, 1228-29 (Or. Ct. App. 1996); *State* v. *Gehrke*, 474 N.W.2d 722, 724-26 (S.D. 1991).

Some state courts considering substantially similar statutory language, by contrast, have held that

recidivist enhancements *do* apply for simultaneous convictions or plea agreements that correspond to separate indictments and separate incidents. In *People* v. *Wiley*, 889 P.2d 541 (Cal. 1995), for example, the California Supreme Court considered a case where a defendant had been "convicted in court trials occurring only one day apart, and * * * sentenced in both cases during the same court session." *Id.* at 593. There, the court noted that the "proper application of the requirement that the prior charges be 'brought and tried separately,' * * * frequently depends upon the interpretation of complex and detailed provisions of California criminal procedure." *Id.* at 590 (quoting Cal. Penal Code § 667(a)). Moreover, "there are, of course, some underlying 'facts' that are relevant to the determination as to whether charges have been 'brought and tried separately * * *.'" *Ibid.* Ultimately, the court determined that because the cases had different case numbers, one could be considered prior to the other. *Id.* at 593. For similar examples, see *State ex rel. Collins* v. *Superior Court*, 689 P.2d 539, 540-41 (Ariz. 1984); *Cornwell* v. *United States*, 451 A.2d 628, 629-30 (D.C. 1982); *Smith* v. *State*, 584 So. 2d 1107, 1108 (Fla. Dist. Ct. App. 1991), overruled on other grounds by *Jeffries* v. *State*, 610 So. 2d 440 (Fla. 1992); *Philmore* v. *State*, 428 S.E.2d 329 (Ga. 1993).

Under the government's rule, a federal sentencing court – determining under the ACCA whether a state recidivist law could have applied to a given offender – would have to decide precisely the same sort of complex legal questions. Sometimes these questions will raise a matter of first impression regarding *state* law that, under the government's approach,

could be resolved only after a lengthy *federal* proceeding.[11]

2. If anything, the factual questions presented by the government's "actually faced" inquiry will be even more complicated than the legal ones. Most states, for example, permit a prior conviction in another jurisdiction to serve as a predicate offense under their own recidivist laws, when the out-of-jurisdiction crime is the same or similar to a predicate offense under the home state's laws. Federal courts applying state recidivist laws *ex post* would therefore frequently have to determine whether an out-of-jurisdiction conviction would constitute a predicate offense if it had been committed in-jurisdiction. In addition to presenting complicated

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[11] In fact, the Washington convictions at issue in this case may present just such an example. Although the government contends that there is "no dispute in this case that * * * respondent was subject to a maximum term of imprisonment of ten years on each of his three convictions under Washington law * * *" (U.S. Br. 14), that is not so. The basis for this contention is an admission in respondent's plea agreement that "[t]he crime with which I am charged carries a maximum sentence of 10 years imprisonment and a $20,000 fine." J.A. 28. It is unclear, however, whether respondent was in fact subject to the enhancement. As in *Shiffler*, respondent's prior convictions were entered on the same date. See U.S. Br. 4 n.2. Yet Washington's recidivist statute subjects to enhancement any person "convicted of a second or subsequent offense under this chapter" (Wash. Rev. Code § 69.50.408(a) (1994)), and "an offense is considered a second or subsequent offense, if, *prior* to his or her conviction of the offense, the offender has at any time been convicted [of an offense] relating to narcotic drugs * * *" (*id.* § 69.50.408(b) (emphasis added)). It does not appear that Washington courts have addressed whether, under this statute, one conviction may serve as a predicate offense for another conviction entered on the same day. *Cf. State* v. *Jones*, 244 P. 395 (Wash. 1926) (holding that original state recidivist statute did not apply to a defendant who pled guilty to three separate informations on the same day).

legal questions, these inquiries often turn on the determination of facts underlying out-of-jurisdiction convictions.[12]

To offer one characteristic example of the complexity of this sort of factual inquiry, in *People* v. *Fumai*, 828 N.Y.S.2d 79 (N.Y. App. Div. 2006), the

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[12] Some states require substantial similarity or near equivalence between out-of-jurisdiction convictions and in-jurisdiction offenses in the application of general recidivist enhancements. See, *e.g.*, 730 Ill. Comp. Stat. § 5/5-5-3.2(b)(1); N.C. Gen. Stat. § 15A-1340.14(e); Tenn. Code Ann. § 40-35-107(b)(5); Tex. Penal Code Ann. § 12.42(c)(2)(b)(v). Pennsylvania employs a substantial similarity provision in respect to its drug recidivist law. See 18 Pa. Cons. Stat. § 7508(a.1).

Other states require convictions in other jurisdictions to include all or most of the elements that would constitute a violation in the home state, or elements "similar" to those of the home-state offense, in respect to their general recidivist enhancements. See, *e.g.*, Alaska Stat. § 12.55.145(a)(1)(B); Cal. Penal Code § 667.5(f); Conn. Gen. Stat. § 53a-40; D.C. Code § 22-1804(a). New York applies a "same elements" provision with respect to its violent felony recidivist enhancement. See N.Y. Penal Law § 70.04(b)(i).

Still other states count out-of-jurisdiction convictions as predicates under their general recidivist laws where the crime, if committed within the State, would constitute a felony in-jurisdiction. See, *e.g.*, Ala. R. Crim. Pro. 26.6(b)(3)(iv); Colo. Rev. Stat. § 18-1.3-801(1.5); Fla. Stat. § 775.082(9)(a)(1); La. Rev. Stat. § 15:529.1(A)(1); Mich. Comp. Laws § 769.10(1); Okla. Stat. Ann. tit. 21, § 54; Or. Rev. Stat. § 161.725(3)(c); S.D. Codified Laws § 22-7-7; Vt. Stat. Ann. tit. 13, § 11; Wash. Rev. Code § 9.94A.030(21)(c).

Finally, other states look to the length of sentence imposed or authorized in the foreign jurisdiction, raising the additional question of whether a *third* layer of recidivist enhancements may apply to qualify a later offense as an ACCA predicate. See, *e.g.*, Ky. Rev. Stat. Ann. § 532.080(2); Miss. Code Ann. § 99-19-83; Neb. Rev. Stat. § 29-2221; N.J. Stat. § 2C:44-4(c); Nev. Rev. Stat. § 207.010(1)(a); N.H. Rev. Stat. § 651:6(II)(a); N.M. Stat. § 31-18-17(D)(2)(c); N.D. Cent. Code § 12.1-32-09(1)(c); R.I. Gen. Laws § 12-19-21; Utah Code Ann. § 76-3-203.5(1)(a).

state court was asked to determine whether the defendant's prior narcotics conviction in Connecticut qualified him for enhanced penalties. The applicability of New York's recidivist enhancement turned on the precise identity of the controlled substance involved in the Connecticut conviction because the Connecticut drug statute covered some substances that would not trigger the enhancement. *Id.* at 80-81. Because the prosecutor in that case "failed * * * to present any evidence as to which 'narcotic substance,' * * * was at issue in the Connecticut case," the appellate court could not determine whether the recidivist enhancement applied. *Ibid.*[13]

Similarly, in *People* v. *McGee*, 133 P.3d 1054 (Cal. 2006), the California court had "to determine whether the [out-of-jurisdiction] conviction alleged qualifies as a conviction under the applicable [California] sentence-enhancement provision." *Id.* at 1062. There the court noted that sometimes "this determination is purely legal," while "[s]ometimes the determination does have a factual content." *Id.* at 1061. In that case, "it was at least theoretically possible that defendant's Nevada convictions involved conduct that would not constitute robbery under California law." *Id.* at 1057. To reach a legal conclusion whether the Nevada convictions "qualifie[d]," the trial court had to review record evidence about the defendant's underlying conduct to "make a factual determination about [the] criminal defendant's intent" and to determine whether the Nevada

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[13] This type of inquiry takes substantial time. Determining whether there were relevant differences in the substances regulated by another jurisdiction on the date of the prior conviction may involve comparing lengthy lists of substances contained in old and possibly superseded regulations.

robberies involved acts of "force or fear." See *People* v. *McGee*, 9 Cal. Rptr. 3d 586, 595-97 (Cal. Ct. App. 2004). These facts were contested; the court reached a determination as to the defendant's intent and use of force in the prior convictions only following a review of testimony contained in transcripts from the preliminary hearings and trials. See *McGee*, 133 P.3d at 1057-58.[14]

When faced with a predicate conviction from a jurisdiction that, like California, allows consideration of such materials in determining of the applicability of the recidivist enhancement, the government's approach presents the federal ACCA court with a dilemma. Deciding whether an offender was actually subject to the recidivist enhancement under similar circumstances would require the court to consider materials that were placed out-of-bounds by *Taylor* and *Shepard*. Yet that kind of inquiry would raise serious constitutional concerns.[15] In *Shepard*, the

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[14] The California Supreme Court noted that the case "present[ed] a serious constitutional issue" under *Taylor* and *Shepard*, but nevertheless concluded that a trial judge may conduct "an examination of the record of the earlier criminal proceeding [if it] is required in order to ascertain whether that record reveals whether the conviction realistically may have been based on conduct that would not constitute a serious felony under California law." *McGee*, 133 P.3d at 1069-71.

[15] Other examples of state court decisions grappling with the question whether out-of-jurisdiction crimes constitute recidivist predicates abound. These cases typically require complicated determinations of both fact and law. See, *e.g.*, *Timothy* v. *State*, 90 P.3d 177 (Alaska Ct. App. 2004), overruling *Butts* v. *State*, 53 P.3d 609, 616 (Alaska Ct. App. 2002) (Oklahoma conviction did not qualify as a predicate offense because the Oklahoma statute covered entry into all motor vehicles while Alaskan law applied only to vehicles adapted for overnight accommodation of persons); *State* v. *Joyner*, 158 P.3d 263, 267 (Ariz. Ct. App. 2007) (because armed robbery may be committed with a simulated deadly weapon in foreign jurisdiction, it does not necessarily constitute a prior vio-

Court held that the "Sixth and Fourteenth Amendments guarantee * * * a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence," even where "the disputed fact * * * can be described as a fact about a prior conviction." *Shepard*, 544 U.S. at 25. But relying on the entire "record of conviction" (*McGee*, *supra*) when applying a recidivist statutes would "ease away" evidentiary limitations (*Shepard*, 544 U.S. at 23), permitting a "wider evidentiary cast" (*id.* at 21). As the *Shepard* Court recognized, such factfinding entails "serious risks of unconstitutionality." *Id.* at 25.

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lent felony); *People* v. *Rodriguez*, 18 Cal. Rptr. 3d 550, 560-61 (Cal. Ct. App. 2004) (because "habitation" under Texas law was different from "inhabited dwelling" under California law, Texas conviction did not qualify as a serious felony in California); *Robinson* v. *State*, 692 So. 2d 883, 887-88 (Fla. 1997) (robbery by sudden snatching under Georgia law was not a qualified offense under Florida's habitual offender statute because the Georgia robbery statute required a lower level of force than Florida law); *State* v. *Carouthers*, 618 So. 2d 880, 882 (La. 1993) (when assessing out-of-state convictions for habitual offender purposes, courts must determine the analogous Louisiana state crime according to the conduct of the offender); *Commonwealth* v. *Shaw*, 744 A.2d 739, 743 (Pa. 2000) (providing detailed considerations to determine whether a foreign conviction is an "equivalent offense" including instruction to "discern whether the crime is malum in se or malum prohibitum"); *State* v. *Webb*, No. E2006-00736-CCA-R3-CD, 2007 WL 642071, at *5 (Tenn. Crim. App. Mar. 5, 2007) (the court could not determine whether defendant's prior convictions would have been felonies or misdemeanors under Tennessee law because Tennessee gambling law requires involvement of two or more persons); *Cox* v. *Commonwealth*, 411 S.E. 2d 444, 446 (Va. Ct. App. 1991) (courts must determine if out-of-state criminal statute permits convictions that would not be allowed under Virginia law); *State* v. *Bunting*, 61 P.3d 375 (Wash. App. 2003) (reversing enhanced sentence because the indictment for the out-of-state prior conviction did not properly allege the ownership element of armed robbery required by Washington law); *State* v. *Hulbert*, 544 S.E.2d 919 (W. Va. 2001) (out-of-state convictions apply only when "the factual predicate upon which the prior conviction was obtained would have supported a conviction under West Virginia" law).

But precluding consideration of such materials by the federal court would raise problems of its own, leading to the sort of inconsistency in sentencing that Congress sought to avoid in the ACCA. If a California state court conducting an unbounded evidentiary inquiry determined that the recidivism enhancement applied and *actually* enhanced the defendant's sentence, the offense would qualify as an ACCA predicate under the government's rule because the enhancement would be obvious on the face of the sentencing papers. By contrast, if the same state court, considering an identical defendant with an identical criminal history, exercised its discretion not to apply the enhancement, a federal court restricted by *Taylor* and *Shepard* would be unable to determine whether the defendant was "actually" exposed to the enhanced sentence. The offense thus would *not* qualify as an ACCA predicate – even though the defendant *was* actually exposed to the enhanced sentence – simply because the question was litigated in a federal court rather than a state court. So however the federal court resolves the dilemma posed by the government's theory in this case, undesirable consequences will follow.

3. The brief discussion above, of course, does not exhaust the types of difficult issues that will arise in determining the "possibility" of a recidivist enhancement. Quite the contrary. State courts have recognized in a range of circumstances the extensive and complicated factfinding and legal decisionmaking necessary to determine whether offenders were subject to state recidivism laws. See, *e.g.*, *State* v. *Bray*, 160 P.3d 983, 990 (Or. 2007) (state recidivist law requires factual and legal determination whether the defendant's criminal history is "sufficiently continuous or recurring to say that it is 'per-

sistent'"); *State* v. *Bell*, 931 A.2d 198, 221 (Conn. 2007) (observing that recidivist law, which applies only where "extended incarceration and lifetime supervision will best serve the public interest" requires factual findings by a jury to satisfy *Apprendi*); *People* v. *Tatta*, 610 N.Y.S.2d 280, 280 (N.Y. App. Div. 1994) (determining "whether the amount of time that the defendant spent as an escapee from custody may be used to toll the 10-year limitation period in Penal Law § 70.06(1)(b)(iv) for the purpose of determining his status as a second felony offender," and concluding that sentencing courts must determine when prior convictions took place and whether and for how long the defendant actually was incarcerated for each).

4. The government could not avoid these myriad problems by urging a rule that counts a prior conviction as an ACCA predicate only when a state court has actually applied the enhancement. Frequently, it will be unclear whether the enhancement actually was applied in the state proceeding. State court records may be unavailable, or may not include this information. In a state where eligibility for an enhancement depends on the prosecutor filing notice of the enhancement, a disputed factual question may arise regarding whether notice was provided. In a state where an enhancement applies automatically if a defendant has a qualifying prior conviction, the enhancement presumably would be deemed applied even if there is no indication in the state record of its application. In these cases, the federal sentencing court would need to engage in the type of complicated legal and factual inquiries described above to determine whether a defendant's prior conviction actually triggered the state enhancement.

Moreover, it will not always be clear whether a potential ACCA predicate conviction comes from a state where an enhancement applies "automatically" rather than one where it applies only when a judge or prosecutor makes a discretionary decision to apply it. In Washington, for example, the lower courts are divided on whether the recidivist provision (Wash. Rev. Code § 69.50.408) in fact applies automatically, as the government has argued (J.A. 197, U.S. Br. 8), or applies only at the discretion of the judge or prosecutor. Compare *State* v. *O'Neal*, 109 P.3d 429, 446 (Wash. App. 2005) (acknowledging discretion); *State* v. *Mayer*, 86 P.3d 217, 221 (Wash. Ct. App. 2004) (same); *State* v. *Cameron*, 909 P.2d 309, 312 (Wash. App. 1996) (same), with *In re Hopkins*, 948 P.2d 394, 397 (Wash. App. 1997), rev'd, 976 P.2d 616 (1999) (appellate court held that enhancement was required and not discretionary, but state supreme court reversed prior to reaching the question).[16] Thus, to determine whether a conviction qualifies as an ACCA predicate, federal sentencing courts would have to determine the precise procedural rules that apply in various states regarding enhancements.

Finally, even where it is clear from state records that the state court actually applied a recidivist enhancement, the state court may have applied the enhancement after resolving disputed facts about the defendant's conduct underlying the prior conviction. Such findings raise serious constitutional concerns (see *Shepard*, 544 U.S. at 25-26 (plurality opinion)),

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[16] The language of Washington's recidivist statute is permissive, not mandatory: "Any person convicted of a second or subsequent offense under this chapter *may* be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both." Wash. Rev. Code § 69.50.408(1) (emphasis added).

and the ACCA should not be read in a manner that would compound these errors.[17]

B. The Government's Rule Will Undermine The States' Prerogative To Determine The Procedures Necessary To Invoke Recidivist Enhancements, Upsetting The Balance Between Federal And State Courts Drawn By Congress In The ACCA.

In addition to injecting complexity and inconsistency into the ACCA sentencing process, the government's approach would work a significant interference with state criminal procedures and the exercise of state prosecutorial discretion. Recognizing that complicated and disputed factfinding often occurs in the application of recidivist laws, many states have established safeguards to ensure that recidivist statutes apply only where certain procedural standards are satisfied. But the government's reading of the ACCA would lead federal courts to disregard these guarantees. Such an outcome could not be reconciled with Congress's goal in the ACCA to "preserve a strong concept of Federalism." H.R. Rep. No. 99-849, at 3 (1986).

Some states, for example, require that a jury find the fact of prior conviction beyond a reasonable doubt. See, *e.g.*, Tex. Penal Code § 12.42; *Talley* v. *State*, 909 S.W.2d 233, 236 (Tex. App. 1995); *Wash-*

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[17] Reading the ACCA to count these convictions as predicates will encourage defendants to try to vacate these sentences in state court. If they are successful, they will then be able to return to federal court to challenge their the ACCA sentences under 28 U.S.C. § 2255. See *Johnson* v. *United States*, 544 U.S. 295 (2005).

ington v. *Commonwealth*, 616 S.E.2d 774, 778 (Va. Ct. App. 2005). Under the government's rule, however, federal courts would not be bound by the same procedural restrictions. Federal courts might therefore determine that an offender was subject to a recidivism enhancement based on a preponderance of the evidence, even where disputed facts would not have been proven beyond a reasonable doubt. The government's proposed rule would thus undermine the states' prerogative to determine the legal process for factfinding that criminal defendants are due in the application of state recidivism laws.

Other states require that prosecutors provide notice before seeking a recidivism enhancement. See, *e.g.*, N.Y. Crim. Pro. Law § 400.20(4); Va. Code Ann. § 19.2-297.1; *Rollinson* v. *State*, 743 So. 2d 585, 589 (Fla. Dist. Ct. App. 1999); *Commonwealth* v. *Fernandes*, 722 N.E.2d 406 (Mass. 1999). But having federal courts determine whether offenders *could have* been subject to such an enhancement, even when notice was not provided, would effectively override states' notice requirements, counterfactually applying the enhancement without notice.

In addition, counterfactual application of a recidivist enhancement would usurp a state prosecutor's discretion not to seek such an enhancement in the first instance. See, *e.g.*, *Portalatin* v. *Graham*, 478 F. Supp. 2d 385 (E.D.N.Y. 2007) (recognizing prosecutorial discretion to seek recidivist enhancement); *State* v. *Parks*, 553 S.E.2d 695 (N.C. App. 2001) (same); *Commonwealth* v. *Daniels*, 656 A.2d 539 (Pa. Super. Ct. 1995) (same); *State* v. *Klemke*, 537 N.W.2d 149 (table) (Wis. Ct. App. 1995) (recognizing court's discretion to apply enhancement). A prosecutorial decision not to seek a recidivist enhancement, even when the defendant actually was

subject to it, represents a decision that the defendant did not warrant the higher sentence. Under the government's rule, later federal sentencing courts would set aside those decisions and consider the enhancements nevertheless.

Other states provide safety valves that allow courts to renounce application of a recidivist enhancement. In California, for example, courts may "strike a strike" by "dismiss[ing] prior felony conviction allegations in furtherance of justice on [the court's] own motion in a case brought under the Three Strikes law." *People* v. *Romero*, 917 P.2d 628, 632 (Cal. 1996). There, the trial court struck the prior conviction "in the interest of justice." *Id.* at 632 (quoting *People* v. *Burke*, 301 P.2d 241, 244 (Cal. 1956)). For a federal sentencing court to later count such a conviction as an ACCA predicate because the defendant was "eligible" for an enhancement would override the state's decision about how to treat the case.[18]

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[18] As the government notes, "some members of the Court" have suggested that *Almendarez-Torres* should be overruled. U.S. Br. 27 n.10. That possibility provides a further practical reason to avoid adopting the government's rule in this case. If the Court overrules *Almendarez-Torres* and holds that recidivism must be submitted to a jury and proved beyond a reasonable doubt, the federal courts will be flooded with challenges by defendants to their ACCA-enhanced sentences – even if the Court holds that the rule is not retroactive to federal cases. Defendants sentenced to enhanced terms under the ACCA could still launch Sixth Amendment challenges in state courts against their improperly enhanced predicate state-court convictions, as many state courts have held that they are free to reject this Court's retroactivity holdings. See, *e.g.*, *Daniels* v. *State*, 561 N.E.2d 487, 489 (Ind. 1990); *State ex rel. Taylor* v. *Whitley*, 606 So. 2d 1292, 1296-97 (La. 1992); *State* v. *Whitfield*, 107 S.W.3d 253, 266-68 (Mo. 2003); *Colwell* v. *State*, 59 P.3d 463, 470-71 (Nev. 2002); *Cowell* v. *Leapley*, 458 N.W.2d 514, 517-18 (S.D.

III. THERE IS NO PRINCIPLED BASIS FOR DISTINGUISHING BETWEEN COLLATERAL SENTENCING ENHANCEMENTS LIKE RECIDIVISM AND MANDATORY SENTENCING GUIDELINES THAT CAP SENTENCES.

The defect in the government's theory is demonstrated most graphically by an evident flaw of logic at the heart of its case. The government insists that the dispositive consideration under the ACCA is the sentence the defendant "actually faced" or "*could* have received." U.S. Br. 21-22 (emphasis in original). That is so, the government maintains, because Congress contemplated floating "maximum terms of imprisonment" for different categories of offenders; therefore, in the government's view, the increased penalty that a repeat offender "actually face[s]" under a recidivist statute bumps up the relevant maximum term. But the government lacks the courage of its convictions: it insists that other, equally binding provisions of state law that *reduce* the sentence actually faced by categories of defendants must be ignored for ACCA purposes.

This case illustrates the point. As the government concedes (see U.S. Br. 28), the Washington sentencing guidelines that were in force at the time of respondent's convictions – and that were mandatory and binding under state law – capped the maximum

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1990). *Cf. Danforth* v. *State*, 718 N.W.2d 451 (Minn. 2006), cert. granted, 127 S. Ct. 2427 (2007). Upon successful challenges to ACCA predicates in state court, these defendants could return to federal court to challenge their ACCA-enhanced sentences. See *Johnson* v. *United States*, 544 U.S. 295 (2005). Therefore, adopting the government's proposed rule in this case could create an unnecessary flood of litigation in state and federal courts if this Court does overrule *Almendarez-Torres*.

term to which he could be sentenced at fifty-seven months. That period is less than the five-year statutory maximum for his offense and well below the ten-year ACCA trigger. Under controlling state law, *that* was the maximum term that respondent "actually faced" or "*could* have received."

For reasons we have explained, we believe that the ACCA is best regarded as focusing on the maximum penalty that the legislature associated with the offense of conviction – in this case, five years. But if that submission is rejected and the focus properly is on the term that the defendant "actually faced," the government offers no coherent reason for taking account of the recidivism enhancement and *not* the equally binding guidelines limit. The government's test appears to be a sort of unprincipled one-way ratchet that drives sentences up but not down. And that is not a proper basis for construing a criminal statute that imposes severe, mandatory prison terms on defendants.

1. Numerous states have sentencing guidelines that, absent a finding of or admission to aggravating factors, cap the maximum term of imprisonment for any given offense at a level *below* that set by the statute defining the offense. Application of the sentencing ranges prescribed by these determinate sentencing systems is mandatory.

Respondent was sentenced under the Washington guidelines regime subsequently addressed by this Court in *Blakely* v. *Washington*, 542 U.S. 296 (2004). Under the system as it operated prior to *Blakely*, Washington recognized a "standard range" for each offense. *Id.* at 299. State judges could impose "exceptional sentence[s]" exceeding the standard range only after finding certain aggravating

factors. *Ibid.* Because the sentencing judge found no such factors in respondent's case, the standard range was binding and the guidelines therefore capped his sentence at fifty-seven months, notwithstanding the statutory maximum of five years prescribed for his offense and the recidivism statute invoked by the government.

In *Blakely*, the Court held that allowing judicial findings of aggravating factors to increase the defendant's sentence above the statutory maximum violates the Sixth Amendment. 542 U.S. at 308. Respecting the Washington sentencing system, the Court held that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303 (emphasis in original). See also *Cunningham* v. *California*, 127 S. Ct. 856, 865 (2007) ("Because the judge in *Blakely*'s case could not have imposed a sentence outside the standard range without finding an additional fact, the top of that range – 53 months, and not 10 years – was the relevant statutory maximum."). Accordingly, in states affected by *Blakely*, sentencing guidelines – absent additional facts charged by the prosecutor and either found by a jury or admitted by a defendant – typically mandate a sentence *below* the maximum written into the underlying offense.[19]

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[19] *Blakely* has affected the sentencing regimes of many states. These states generally have revised their sentencing statutes to require juries to find aggravating facts that increase a sentence beyond the standard range prescribed by the guidelines. See Alaska Stat. § 12.55.155(f); Ariz. Rev. Stat. Ann. § 13-702.01(J); Kan. Stat. Ann. §§ 21-4716(b), 27-4718(b); Minn. Stat. § 244.10, subdiv. 5; N.C. Gen. Stat. § 15A-1340.16(a1); Or. Rev. Stat. § 161.735(6); Wash. Rev. Code § 9.94A.537(3). The Colorado Su-

2. If the government's theory of the sentence "actually faced" by the defendant is correct, recidivist enhancements cannot be distinguished from state sentencing guidelines that *mandate* sentences within a presumptive range. When state sentencing guidelines like Washington's cap a defendant's maximum term at a lower level, a defendant is not *eligible* for a term of imprisonment equivalent to the maximum included in the offense itself. Because the government's proposed rule turns on the maximum sentence a defendant "actually faced," determinative guidelines systems that cap a maximum term accordingly must, under that theory, be relevant to the application of the ACCA.

Indeed, if the government is correct and collateral factors like recidivism are relevant to the ACCA, this Court has already settled that sentencing guide-

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preme Court has adopted this approach as well. *Lopez* v. *People*, 113 P.3d 713, 716 (Colo. 2005).

Other states affected by *Blakely* necessarily have found that sentences premised on judicial factfinding in violation of *Apprendi* violate the Sixth Amendment, but many have yet to respond systematically to *Blakely*, further demonstrating the inherent complexity of the government's approach. See, *e.g.*, *People* v. *Black*, 161 P.3d 1130, 1135-38 (Cal. 2007) (applying *Blakely* and *Cunningham* to hold that sentences in excess of presumptive range require factfinding approved by *Apprendi*); *State* v. *Maugaotega*, 168 P.3d 562, 573-76 (Haw. 2007) (finding same for Hawaii's guidelines); *State* v. *King*, 168 P.3d 1123, 1127-29 (N.M. Ct. App), cert. granted, 169 P.3d 409 (N.M. 2007) (finding same for New Mexico's guidelines); *State* v. *Gomez*, No. M2002-01209-SC-R11-CD, 2007 WL 2917726, at *5-6 (Tenn. Oct. 9, 2007) (finding same for Tennessee's guidelines).

Some state courts have suggested that their state legislatures resolve *Blakely* and *Cunningham* questions. See, *e.g.*, *State* v. *Natale*, 878 A.2d 724, 741 (N.J. 2005); *State* v. *Foster*, 845 N.E.2d 470, 495 (Ohio 2006). See also *Cunningham*, 127 S. Ct. at 871 n.17 (listing examples of States that have amended sentencing guidelines to require a jury to find aggravating facts).

lines must also be taken into account when calculating "the maximum term of imprisonment." *R.L.C.*, 503 U.S. at 295-96. *R.L.C.* involved the application of 18 U.S.C. § 5037(c), which provided that a juvenile may not receive a sentence in excess of "the maximum term of imprisonment that would be authorized if the juvenile had been tried and convicted as an adult." *R.L.C.*, 503 U.S. at 296 (quoting 18 U.S.C. § 5037(c)(2)(B)(ii)). The Court rejected the government's argument that "'authorization' refers only to what is affirmatively provided by penal statutes, without reference to the Sentencing Guidelines to be applied under statutory mandate * * *." *Id.* at 297. Instead, the Court held that the relevant term of imprisonment was set by the federal guidelines. *Id.* at 306.

The government attempts to distinguish *R.L.C.* on the ground that the statute there at issue "expressly contemplated an offender-specific maximum sentence," while the ACCA focuses on the term available "for the underlying *offense*." U.S. Br. 34 (emphasis in original). But as we have explained, the government's attack on the holding below is premised on precisely the opposite proposition: that the ACCA is an "offender-specific" statute that takes account of varying sentences that may be imposed on different categories of defendants. And the very sort of anomaly that the government believes explains *R.L.C.* – that, because of the binding effect of the guidelines, a juvenile could have been sentenced to a longer term than an identically situated adult (see U.S. Br. 34-35) – is present here: the government

would treat a defendant as "eligible" for a sentence that he or she could not lawfully serve.[20]

In fact, the government offers no explanation for why it makes sense to consider recidivist enhancements but not guidelines caps. The closest it comes is when it asserts that, while the language of the ACCA "accommodates the possibility of alternative 'maximum term[s] of imprisonment' prescribed by statute for recidivists and non-recidivists, it does not contemplate a different "maximum term of imprisonment' for *every* offender." U.S. Br. 29. But this contention is wrong on two scores. Guidelines regimes typically do not set a "different" maximum term for each offender; the Washington guidelines applied to respondent set a cap lower than the ACCA minimum for all defendants convicted of his offense, absent proof of aggravating factors. And the government, in any event, does not even attempt to explain *how* the language of the ACCA accommodates variation of one sort but not of the other.

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[20] The government finds no support in *United States* v. *Murillo*, 422 F.3d 1152 (9th Cir. 2005), cert. denied, 547 U.S. 1119 (2006), cited at U.S. Br. 29. In interpreting Section 922(g), the Ninth Circuit found that "the maximum sentence is the statutory maximum sentence *for the offense*, not the maximum sentence available in the particular case under the sentencing guidelines." *Murillo*, 422 F.3d at 1154 (emphasis added). Respondent agrees that the Court's inquiry should be limited to the maximum term of imprisonment *for the offense*, which would preclude relying on either state sentencing guidelines *or* recidivist enhancements. The Ninth Circuit took the same approach in *United States* v. *Parry*, 479 F.3d 722, 725-26 (9th Cir.), cert. denied 128 S. Ct. 249 (2007) (considering penalty "for the offense rather than the term the defendant could "actually" spend in prison). Neither decision suggested that the term set for the "offense" is modified by a possible recidivist enhancement.

The government's further observation that Congress did not anticipate this Court's decisions in *Blakely* and *Apprendi* (U.S. Br. 31) is beside the point.[21] Both pre- and post-*Blakely*, binding guidelines set the sentence for which the defendant was "eligible"; under the government's test, that is what matters. Indeed, especially in states that have "*Blakely*-ized" their guidelines to require that juries find the existence of aggravating circumstances that increase the sentence faced by the defendant, there is a strong argument that *the guidelines themselves* define the "offense" for purposes both of state law and of the ACCA. The government's insistence that even such post-*Blakely* guidelines do not affect the maximum sentence that is considered under the ACCA – but that recidivist enhancements do – powerfully demonstrates that its approach lacks any grounding in law or principle.

3. In this case, the Washington sentencing guidelines established that the maximum sentence respondent "actually faced" for his drug convictions was significantly less than ten years. Respondent pleaded guilty to delivery of a controlled substance

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[21] Even if true, it also would be beside the point that, as the government contends, Congress did not have guidelines at the forefront of its mind when it enacted the ACCA. U.S. Br. 31-32. The government's theory is that the relevant inquiry looks to the sentence the defendant "actually faced" (*id.* at 21); if that were so, Congress would have had no reason to distinguish between state-law recidivist enhancements and sentencing guidelines. Moreover, as the government acknowledges (see *id.* at 31-32), Congress was in fact aware that many states had reformed their sentencing laws in the years immediately preceding passage of the ACCA. See, *e.g.*, Alaska Stat. § 12.55.005 (2007) (Alaska sentencing reform enacted in 1978); 1978 Minn. Laws 723 (enacting Minnesota determinate sentencing system in 1978); Wash. Rev. Code § 9.94A.905 (Washington sentencing law was reformed in 1983).

from "Schedule III-V" in violation of Wash. Rev. Code § 69.50.401(a)(1)(ii)-(iv) (1994). The maximum sentence specified by that statute was five years. *Ibid.* The sentencing range in place at the time of respondent's sentencing, which took account of respondent's criminal history, was 43-57 months. J.A. 42, 93. See also Wash. Rev. Code § 9.94A.310 (1994). Because no aggravating facts were charged by the prosecutor, admitted by respondent, or found by the judge, the maximum term of imprisonment that respondent "actually faced" at the time – and, under *Blakely*, the maximum term to which he constitutionally could have been sentenced – was fifty-seven months.

If defendant-specific factors like recidivism are found relevant to the ACCA, respondent's "maximum term of imprisonment * * * prescribed by law" for the Washington convictions was fifty-seven months. Under the government's theory, this conviction is thus insufficient to qualify as an ACCA predicate offense.[22]

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[22] The government is incorrect in asserting that respondent acknowledged in his brief in opposition to the petition for certiorari that he failed to make this argument below and, for that reason, waived any argument that the relevant ACCA "maximum term" in his case is that set by the guidelines. U.S. Br. 28. The language from the brief in opposition cited by the government stated only that "[w]e are not arguing here that the judgment below should be upheld because respondent's maximum sentence was limited [under Washington's guidelines]. Rather, we are pointing out the bizarre consequences of the government's self-contradictory rule." Br. in Opp. 15 n.7. As the opposition explained, our principal argument relating to the guidelines is that they demonstrate the flaw in the government's theory.

But if the Court concludes that it may look beyond the sentence associated with the offense of conviction in determining the sentence for the ACCA purposes, respondent should be free to contend that the sentence he "actually faced" was the guide-

4. Three conclusions follow from consideration of the sentencing guidelines. First, as suggested above, our principal submission is that the Court should avoid the serious complications created by consideration of collateral sentencing factors like recidivism, as well as of the guidelines, by focusing the ACCA inquiry on the sentence associated by the legislature with the crime of conviction – the rule that follows from the statutory language and purpose. Second, the government's dismissal of the guidelines demonstrates the incoherence of its case. And third, if the government's approach to the ACCA nevertheless is accepted, respondent's sentence fell well short of the ACCA trigger. However it is sliced, then, the decision below should be affirmed.

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lines sentence. He argued below that his sentence did not qualify as an ACCA predicate; the guidelines argument is simply an elaboration of that position. Moreover, given the holdings of both courts below in respondent's favor, they would not have reached the relevance of the guidelines point had it been pressed. And respondent, as the prevailing party, may "assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams*, 397 U.S. 471, 476 n.6 (1970). See also *United States* v. *Am. Ry. Exp. Co.*, 265 U.S. 425, 436 (1924) (holding that a party may "assert[] additional grounds why the decree should be affirmed"); Illinois v. Gates, 462 U.S. 213, 219-20 (1983) (quoting *Dewey* v. *Des Moines*, 173 U.S. 193, 197-98 (1899)) (holding that parties "are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed" and questions presented below may be "enlarge[d]").

IV. BECAUSE THE NATION'S SENTENCING REGIMES HAVE CHANGED SIGNIFICANTLY SINCE THE ENACTMENT OF THE ACCA, ANY AMBIGUITY IN THE STATUTE SHOULD BE RESOLVED BY CONGRESS, NOT THE COURTS.

Finally, one additional consideration cuts strongly in favor of respondent. We contend that the plain meaning and policy of the ACCA support the view that, in determining whether an "offense" is one "for which a maximum term of imprisonment of ten years or more is prescribed by law," courts should look solely at the sentence associated with the offense itself. But to the extent that the proper interpretation of the ACCA is unclear, the rule of lenity dictates that "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)). See also *Lewis* v. *United States*, 445 U.S. 55, 65 (1980) (noting that the rule of lenity applies in situations where the meaning of a statutory provision is ambiguous). The rule is "an outgrowth of [the Court's] reluctance to increase or multiply punishments absent a clear and definite legislative directive." *Simpson* v. *United States*, 435 U.S. 6, 15-16 (1978). It is a key principle of statutory construction that "criminal statutes, including sentencing provisions, are to be construed in favor of the accused" (*Taylor*, 495 U.S. at 596), and this principle applies with equal force to sentencing and substantive provisions. See *R.L.C.*, 503 U.S. at 305; *Simpson*, 435 U.S. at 15; *Bifulco*, 447 U.S. at 387.

It bears emphasis that the lenity principle applies with special force in this case because the sentencing world has undergone convulsive changes since the enactment of the ACCA. Although there were recidivist statutes on the books when Congress passed the ACCA in 1984 and amended it in 1986, Congress acted in response to a perceived need to augment inadequate state regimes for dealing with repeat offenders. The statute was intended "to supplement state prosecutions, not to supersede them." S. Rep. No. 98-190, at 10. But that world of inadequate state penalties for recidivism no longer exists. Over the intervening decades, various sentencing regimes, including state recidivism statutes and so-called "three strikes" laws, have become ubiquitous, often imposing harsh mandatory penalties. See Thomas B. Marvell & Carlisle E. Moody, *The Lethal Effects of Three-Strikes Laws*, 30 J. Legal Stud. 89, 89 (2001) (noting that twenty-four States enacted "three strikes and you're out" laws between 1993 and 1995). In addition, state and federal sentencing guidelines have taken on a more prominent role, with post-*Apprendi* developments changing the landscape even more dramatically.

Against this background, the application of recidivist enhancements to the ACCA has implications for federal and state laws that Congress never envisioned. In such circumstances, the Court should leave it to Congress to address ambiguities in the ACCA and to determine how that statute relates to increasingly robust state recidivist statutes and "*Blakely*-ized" sentencing guidelines. Application of the rule of lenity under these circumstances therefore would be especially attentive to the separation of powers concerns inherent in judicial extension of criminal penalties in the absence of clear legislative

authorization. As in all cases where the Court applies the rule of lenity, if the intent of Congress conflicts with the Court's reading, Congress can utilize the "simple remedy" of "insertion of a brief appropriate phrase, by amendment, into the present language" of Section 924(e)(2)(A)(ii). *Bifulco*, 447 U.S. at 401. See also William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991) (tracing the history of Congress's actions to clarify criminal statutory language subsequent to judicial application of the rule of lenity). If the square recidivism peg is to be fit into the round ACCA hole, "it is for Congress, and not this Court, to enact the words that will produce the result the Government seeks." *Bifulco*, 447 U.S. at 401.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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